53629

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
JAMES MARTIN, Defendant-Appellant.	)	HONORABLE PAUL F. GERRITY Presiding

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The defendant was charged with the crime of gambling in violation of Ill. Rev. Stat. 1967, ch. 38, § 28-1(a)(5). At a bench trial he was found guilty and fined $90.00.

At a pre-trial motion to suppress evidence taken from the defendant, the sole witness, Officer Frank Riggio, testified that he arrested the defendant without a search warrant on July 10, 1968, near 740 Madison Street, in Chicago. On direct examination he stated, "My reason for stopping Mr. Martin was that I had known him before." On cross-examination he indicated he had "known the defendant from previously arresting him for bookmaking." The officer testified that he had placed the defendant under arrest after having observed him, from a distance of 50 feet, accept a piece of paper and some money from an unknown male after a brief conversation. A subsequent search of the defendant revealed bet slips and currency.

We must hold that the trial court erred in refusing to allow defendant's motion to suppress. This case is governed by the principles set out in People v. Wexler, 116 Ill. App. 2d 400. In that case we held that probable cause had existed for an arrest for gambling when the arresting officer had noticed five people approach the defendant within a 20-minute period, each handing the defendant slips of paper and money. We distinguished United States v. Asendio, 171 F. 2d 122 (3d Cir.), in which case the court held there was no probable

cause for arrest when the arresting officer had seen the defendant accept only one small package on a street corner. We indicated that we attached importance to the fact that in Asendio only one transaction was observed, and we noted at page 408 that "An isolated act may appear innocent, but a series of similar transactions, by virtue of the repetition, may be sufficient to support an arrest." We cannot, however, see the distinction between the facts of the present case and those in Asendio. In Wexler there was testimony that the particular conduct under observation was repeated numerous times within a short period. In the instant case, there was testimony only that the officer had known the defendant and had previously arrested him for bookmaking. Such testimony does not establish probable cause.

Notwithstanding the State's statement in its brief that "the arresting officer actually saw betting slips and currency passing between the defendant and another unknown man," the officer did not so testify. He stated that he saw the unknown man hand Martin "a piece of paper and some currency" and that such observation was made from a distance of 50 feet. It is a misstatement to equate Officer Riggio's testimony with the assertion contained in the State's brief. The officer discovered that the papers were betting slips only after he had arrested and searched the defendant. The arrest and subsequent search were unlawful since there was no probable cause present to justify the arrest.

Since we have concluded that defendant's motion to suppress should have been sustained there is no necessity for considering the defendant's other arguments. The judgment is reversed and the cause remanded with directions that the court sustain defendant's motion to suppress.

REVERSED AND REMANDED
WITH DIRECTIONS.

LYONS, J., and BURKE, J., concur.

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54588

ABST.

FRED WILLIAMS ,

Plaintiff-Appellee,

vs.

BENJAMIN BUTLER,

Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY

HON. LOUIS A. WEXLER, JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Fred Williams, brought an action against defendant, Benjamin Butler, for damages to his automobile resulting from a collision on March 4, 1967. Summons was served on the defendant, an appearance was filed by his counsel, and the cause was set for trial on December 18, 1968. On that date, the defendant did not appear, evidence was heard ex parte and judgment was entered for the plaintiff in the amount of $219.29.

On February 18, 1969, the defendant presented a verified petition to vacate the default judgment on the grounds that (1) the attorney for defendant was a patient awaiting surgery in the Illinois Research Hospital on the date when the case was heard and was not in communication with his client, and (2) the defendant had a good and meritorious defense of "payment". On February 18th, the judgment was vacated and the defendant was ordered to pay to the plaintiff witness fees in the amount of $25.00. The matter was reset for trial on May 27, 1969. The defendant failed to pay the witness fees as ordered. The court being apprised of that fact on June 23rd, sustained plaintiff's motion for judgment for failure to obey the order of the court and re-entered judgment in plaintiff's favor in the amount of $219.29.

On July 8, 1968, the defendant filed a petition pursuant to the provisions of Section 72 of the Civil Practice Act, in which he alleged that on June 1, 1967, the Covenant Insurance Company settled plaintiff's claim for damages and paid him the sum

of $400.00 and plaintiff signed a release against defendant. Defendant contended that plaintiff is now fraudulently suing him again for the same damages. This motion was denied, and the defendant appeals.

It is the defendant's contention that while the court had the power to assess witness fees, the court abused its discretion in ordering the defendant to pay $25.00 for plaintiff's witness fees in the face of the fact that the court had evidence before it of payment accepted by the plaintiff and his executed release. Defendant argues that since the default judgment was thus a fraud upon the court, plaintiff was not entitled to the witness fees.

The record establishes that the defendant failed to pay the witness fees ordered as what appears to be a condition or sanction for the vacation of the judgment more than thirty days after it entry. It is clear that plaintiff appeared and testimony was heard before the default judgment was rendered against the defendant. It is not claimed that the judgment was illegal for want of jurisdiction and void.

The court may vacate a default judgment upon any terms and conditions that shall be reasonable. Ill. Rev. Stat., 1967, ch. 110, §50(5). We are of the opinion that it was well within the discretion of the judge to impose the terms which he did upon the vacation of the judgment and that the defendant was in no position to object. We believe this was a proper case in which to require the payment of witness fees as a condition for vacating the default judgment and was clearly within the scope of the court's discretion. Brook v. Smerling, 204 Ill. App. 250. When the defendant failed to satisfy the condition for the vacation

of the default judgment, it was proper for the judge to reinstate that judgment.

The judgment of $219.29 for the plaintiff against the defendant is therefore affirmed.

AFFIRMED.

MURPHY AND ADESKO, JJ.

CONCUR.

(Abstract only)

No. 53393

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT
	)	OF COOK COUNTY.
HAROLD L. BROWN, Defendant-Appellant.	)	HON. MAURICE W. LEE PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was charged with receiving stolen property in violation of the statute (Ill. Rev. Stat., ch. 38, §16-1(d)(1) (1967)). In a trial without a jury he was found guilty and on a hearing in aggravation and mitigation the court imposed a sentence of two years on probation on condition that defendant serve the first ninety days in the House of Correction. On appeal defendant contends (1) that he did not knowingly and understandingly waive his right to a jury trial, (2) that the trial court erred in receiving in evidence the testimony of two witnesses who were not competent to testify, and (3) that the sentence pronounced was so incomplete and uncertain as to amount to a nullity. The facts follow.

On behalf of the State, Gerald Ford testified that he and two other boys removed, without the authority to do so, a microscope from Leo High School in Chicago and sold it to the defendant for $6. Danny Lewis testified that he helped take the microscope from the school and was present when it was sold to defendant for $6. On cross-examination Lewis further testified that when the microscope was brought to the defendant, the latter asked, "Where did you steal this from?" Brother Ronald Lasick, the principal of Leo, testified to the

school's ownership of the microscope and set its replacement value at $75. Chicago Police Officer Melvin Masnerwitz testified that he recovered the microscope identified by Brother Lasick when he executed a search warrant at the defendant's home.

Defendant took the stand in his own behalf. He testified that the boys told him the microscope was a Christmas present, that he did not want to buy it, but loaned them $6 so they could attend a movie, that he gave them the money to get them off the street, and that they were going to redeem the microscope, but before they had an opportunity to do so, he was arrested.

Defendant contends that he did not knowingly and understandingly waive his right to a trial by jury. When the case came on for trial, his attorney was not in the courtroom. The judge said to the defendant, "I'll give you exactly five minutes and if you don't show up with your attorney I will have a warrant on you." When the attorney arrived, he informed the court that the plea would be not guilty and a jury was waived. Again after the disposition of two pretrial motions, counsel told the court in the presence of defendant that the jury was waived. Defendant contends that the hurried and hostile atmosphere in the courtroom as a result of the judge's threat to the defendant, coupled with the lack of any explanation by the court of the right to trial by jury, and the defendant's silence, show that the jury waiver was not knowingly and understandingly made.

In the recent case of People v. Sailor, 43 Ill. 2d 256, 253 N.E. 2d 397, it was held that the defendant, by per-

mitting her attorney, in her presence and without objection, to waive the right to a jury trial, was deemed to have acquiesced in and was bound by his action. The court quoted with approval People v. Melero, 99 Ill. App. 2d 208, 211-12, 240 N.E. 2d 756, as follows (p. 261):

> "'The trial court was entitled to rely on the professional responsibility of defendant's attorney that when he informed the court that his client waived a jury, it was knowingly and understandingly consented to by his client.'"

The only case in which a rushed and hostile atmosphere created by the trial judge was held to vitiate an apparent jury waiver is People v. Rivera, 34 Ill. 2d 575, 216 N.E. 2d 786. There the defendant's counsel informed the court on the day preceding trial that the jury would be waived. When the defendant appeared for trial, however, he requested a jury trial and the judge manifested considerable irritation at the change. He reminded counsel three times that the attorney had changed his mind and said, "I'm a speed merchant," and "I have business to take care of and, boom, I'm going to take care of it. The jury doesn't slow me up at all." After being exposed to this verbal barrage, counsel conferred with his client and it was decided that the defendant would waive his right to a jury trial.

In the instant case the irritation of the trial judge was directed at counsel's absence rather than anything relating to a jury demand. That this showing of temperament did not, as in Rivera, charge the atmosphere in the courtroom to such an extent as to coerce a jury waiver is manifest from the lack of any indication of annoyance after the defense attorney appeared ready for trial. We conclude that the de-

fendant's waiver of his right to a jury trial was knowingly and understanding made through his attorney.

Defendant contends that the trial court erred in receiving into evidence the testimony of two accomplices, Danny Lewis and Gerald Ford. Ford was twelve years old and Lewis was a student in the seventh grade. The rule to be applied is stated in People v. Crews, 38 Ill. 2d 331, 231 N.E. 2d 451, where the court said that it is not the age of the child but the degree of intelligence which determines competency to testify and that as long as the witness can receive correct impressions through his senses, recollect and narrate intelligently and appreciate the moral duty to tell the truth, he is competent. The competency of such a witness is to be determined in the first instance by the trial judge and while his decision is reviewable, it is only where there has been an abuse of discretion or a manifest misapprehension of some legal principle that the decision will be reversed. People v. Ballinger, 36 Ill. 2d 620, 225 N.E. 2d 10; People v. Davis, 10 Ill. 2d 430, 140 N.E. 2d 675; People v. Karpovich, 288 Ill. 268, 123 N.E. 324. Both witnesses testified that they knew the difference between telling the truth and lying and that they would tell the truth. The trial judge, who is in a superior position to observe the witnesses and their demeanor, based his determination of competency on those statements. We can discern no abuse of discretion in that determination.

Defendant contends that the sentence pronounced by the court was so incomplete and ambiguous as to amount in

law to a nullity. According to the report of proceedings the State's Attorney recommended that the defendant serve thirty days in the House of Correction and be given one year probation. The trial judge then imposed a sentence of "Two years, the first 90 days in the House of Correction." Defendant argues that by saying simply, "Two years," the judge did not specify whether institutional confinement or probation was intended. That contention is without merit. The obvious import of those words when read in their context is that defendant will be released on probation for a period of two years provided the first ninety days are served in the House of Correction.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

53646

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. BURTON STANFORD [Impleaded], Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JAMES J. MEJDA Presiding

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, Burton Stanford, and a George Williams were indicted for conspiracy to sell narcotics; Stanford was additionally charged with unlawful possession of narcotics. Both defendants entered pleas of not guilty. They produced testimony at a hearing on a motion to suppress evidence of the sale, and on the date set for a ruling on the motion Stanford's attorney requested a conference with the court, the Assistant State's Attorney, and counsel for Williams. At the close of the conference both defendants, through their attorneys, asked permission to withdraw their pleas of not guilty and to enter pleas of guilty to the reduced charge of unlawful possession of narcotic drugs. The pleas were accepted and the defendants were sentenced to the penitentiary; Stanford received a term of not less than three nor more than eight years. From that judgment defendant Stanford takes this appeal. He argues that he was denied his constitutional right to a jury trial and that the inquiries made of him were not adequate under Illinois law.

Mr. Hoard, the attorney representing Stanford, was apparently retained privately, and the Assistant Public Defender, Mr. Unger, represented George Williams. On the record it appears that Mr. Hoard informed the court that

Stanford had been told the conference would not be the subject of any promises. The court asked Stanford if he understood that and he replied that he did. The following are relevant portions of the colloquy concerning the change of pleas.

MR. HOARD: Your Honor, in behalf of the defendant Burton Stanford, through and by his attorney, the heretofore plea of not guilty which was entered in the indictment which is currently before the Court, we ask permission to withdraw that plea of not guilty and enter a plea of guilty to the charge of possession.

* * *

Further, your Honor, on behalf of the defendant he has been informed he is entitled to a jury trial. He is entitled to have this matter heard if he does desire before this Court or a bench trial. And that a plea does not entitle him to any preference by the Court, but the power lies or is invested in the Court itself in terms of whatever sentence the statute has made available in these matters.

By entering the plea of guilty the defendant understands that he does in fact waive his right to a jury trial. And I asked him, is that correct, in open court?

DEFENDANT STANFORD: Yes.

* * *

THE COURT: Mr. Burton Stanford.

DEFENDANT STANFORD: Yes.

THE COURT: Your attorney advises me you wish to withdraw your previously entered pleas of not guilty to the two (2) indictments now before the Court and to enter a plea of guilty as to each of the indictments to the charge of unlawful possession of narcotic drugs which in this instance is the lesser included offense, and which is the charge of indictment 68-2047, is that correct?

DEFENDANT STANFORD: That's correct.

THE COURT: Do each of you understand that you are entitled to a jury trial if you so desire. And that this trial can be submitted to a jury for the trial if you so desire?

DEFENDANT STANFORD: Yes.

DEFENDANT WILLIAMS: Yes.

THE COURT: Knowing this is your right to a jury trial too, further understand when you plead guilty that you automatically waive your right to a jury trial when you plead guilty. Do you understand so?

DEFENDANT STANFORD: Yes.

DEFENDANT WILLIAMS: Yes.

THE COURT: Do each of you understand that by pleading guilty you have and do automatically waive the right to a jury trial. In this case there will be no jury trial on a plea of guilty. Do you so understand?

[Both defendants responded "Yes," and both defendants indicated they were satisfied with the representation from their attorneys.]

THE COURT: Before accepting your pleas of guilty in this matter it is my duty to advise you that on your pleas of guilty to the indictments before the Court, pleading to the lesser included offense of possession of a narcotic drug, that you may be sentenced to the penitentiary for a term of years. It may be any number of years not less than two (2) nor more than ten (10) years.

* * *

Burton Stanford, you understand that upon your plea of guilty to this matter that I may sentence you to the penitentiary for a term of years. It may be any number of years not less than two (2) nor more than ten (10) years on each of the indictments before the Court, and that these sentences could be ordered to be served consecutively, that is one after the other. Knowing this do you still wish to plead guilty to the offense of unlawful possession of narcotic drugs in each of the two indictments now before the Court?

DEFENDANT STANFORD: Yes, I do.

At this point the court accepted the guilty pleas, then informed the defendants that they had the right to make a statement which would be taken into consideration. No evidence in mitigation was presented and both attorneys expressly declined that right. The court then imposed sentences on the two defendants.

Defendant Stanford's assertions in this court that the record fails to show that he understood the nature of the charge and the consequences and effect of his plea of guilty are not borne out by the record. We fail to see what more he would have had the trial court do before accepting a plea of guilty than is shown by the record before us. Significantly, the defendant fails to explicitly point out what it was that the trial court did or did not do which resulted in defendant's erroneously entering a guilty plea. Rather, the defendant in his brief simply repeats a few basic principles regarding the duties of trial judges before accepting guilty pleas, and the bald conclusion that these duties were not met in the present case. However, the record shows that on the contrary, the trial judge proceeded with great patience in carefully explaining the consequences which may result from the entering of a guilty plea; at each critical juncture the judge obtained replies from the defendant that he understood what was being explained; and the defendant was fully admonished in a manner we believe commendable.

There is no point in setting out numerous cases on the subject; suffice it to say that People v. Washington, 5 Ill.2d 58, cited by the defendant, supports the conclusion that the guilty plea in the instant case was properly received. In Washington the court said at page 60: ". . . the record must show that before the entry of the plea the court fully explained its consequences to the defendant and that the explanation was understandingly received." In the instant case adequate explanation was given as to the consequences of a guilty plea; nevertheless, the defendant persisted in that plea.

It is alleged that the trial court committed error in the hearing in mitigation and aggravation. The defendant's argument is not clear; however, it appears he is complaining that the

trial judge failed to conduct the hearing in mitigation; that such hearing is mandatory, and not having been conducted, the case must be reversed. Even if we agreed with the defendant, the case would only be remanded for a hearing, and conviction would not be reversed.

The burden of presenting mitigating circumstances is upon the defendant, and the failure to request such a hearing constitutes a waiver. People v. Nelson, 41 Ill. 2d 364, 367. A trial judge cannot refuse a defendant such a hearing upon his request. No request was made in the instant case. When the judge asked if either defendant had anything to say, they responded that they did not. The judge then asked the attorneys if they had anything to present before he passed sentence, and they indicated they had nothing. If there were any mitigating factors to be taken into account it was the defendant's duty to bring such factors to the attention of the trial judge. Ample opportunity was afforded the defendant to present such matters, and when he failed to do so the judge still imposed on the defendant a sentence carrying a minimum of three years, or just one year above the minimum statutory requirement.

When the defendant mentions a mandatory requirement to conduct a hearing in mitigation he cannot seriously suggest that such a hearing is mandatory in the sense that until it is held no sentence can be imposed. If that were true, no defendant would ever choose to present mitigation circumstances, and by so refusing would preclude the trial judge from imposing any sentence upon him. The "mandatory" aspect means only that the judge is required to hear mitigating circumstances and facts presented to him if the defendant chooses to offer them.

We find, therefore, that the guilty plea was knowingly and understandingly made, and that the defendant waived his right to produce any evidence in mitigation. Accordingly, the judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.

54223

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFFERY DONALD, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY ABST. HONORABLE PHILIP ROMITI Presiding

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The defendant was charged with jumping bail, and originally pleaded not guilty, but later changed his plea to one of guilty. At that time the following colloquy occurred in the court:

Mr. Callahan: I have discussed the case with Mr. Donald, and he indicated to me at this time he wishes to withdraw his plea of not guilty and enter a plea of guilty to the bail jumping charge. Is that right, Mr. Donald?

Defendant: Yes, sir.

The Court: Mr. Donald, you understand your counsel is advising me now you wish to change your plea of not guilty to a plea of guilty, is that correct?

Defendant: Yes, sir.

The Court: You also understand that when you plead guilty you automatically waive your right to a trial by jury.

Defendant: Yes, sir.

The Court: Before accepting your plea, it is my duty to advise you that on your plea of guilty to this charge of jumping bail, you may be sent to the penitentiary for a term of years, a minimum of one, and a maximum of five. You could be sentenced from one to five years. It may be any number of years between those figures, not less than one nor more than five. Anything in between. Knowing that, do you still persist in your plea of guilty?

Defendant: Yes, your Honor.

The Court: Now, let the record show, then, that the defendant has been advised of the consequences of his plea of guilty to this charge, and after being so advised he persists in his plea.

The plea was then accepted and the defendant was sentenced to the Illinois State Penitentiary for a term of one year to one year and one day. The defendant was represented by the Public Defender, who has in this court presented a motion requesting permission to withdraw as attorney of record for the defendant. The motion is made pursuant to Anders v. California, 386 U. S. 738. The Public Defender has also filed a brief in support of his motion, and copies of the motion and brief were served upon the defendant.

On February 26, 1970, our Administrative Assistant informed the defendant by letter that he was being given until May 4, 1970, to file any objections he may have to the Public Defender's motion, or any other points he might have with reference to the case. That time has now elapsed, and the defendant has filed nothing with this court. Accordingly, we are now ruling on the Public Defender's motion and are also reviewing the judgment of conviction.

The colloquy during which the defendant changed his plea to guilty amply supports the conclusion that he was fully advised of his right to a jury trial, and that by pleading guilty he was waiving that right. He was further informed that by pleading guilty he could be sentenced to the penitentiary for a period of years ranging from one to five. Being so advised of the consequences of his plea of guilty, he nevertheless persisted in that plea.

The trial judge fully complied with the dictates of Ill. Rev. Stat. 1967, ch. 38, § 115-2; there was also compliance with Supreme Court Rule 401(b), which provides in substance

that a guilty plea cannot be accepted until the proceeding held in open court indicates that the defendant understands the nature of the charge against him and the consequences of being found guilty. In the instant case the defendant was given the right to withdraw his plea of guilty, but refused to do so, and the trial court properly accepted it. We therefore agree with the Public Defender that an appeal based on the argument that the plea was improperly accepted would be frivolous. After carefully reviewing the record we further agree with the Public Defender that there exists no other basis for appeal which is not frivolous.

Accordingly, we are granting the Public Defender's motion to withdraw as attorney for the defendant, and are affirming the judgment.

AFFIRMED.

LYONS, J., and BURKE, J., concur.